

State of Montana



SENATE JUDICIARY

EXHIBIT NO. 3

DATE 1/27/11

FILE NO. SB 175

First Judicial District Court

Lewis and Clark County Courthouse
228 Broadway, Second Floor
Helena, MT 59601
(406) 447-8205
(406) 447-8209
(406) 447-8421 (Fax)

Broadwater County Courthouse
515 Broadway
Townsend, MT 59644
(406) 266-9236
(406) 266-4720 (Fax)

January 24, 2011

Senate Judiciary Committee
P.O. Box 200500
Helena, MT 59620-0500

RE: SB 175 (Judicial Selection) Testimony in Support

Dear Mr. Chair and Committee Members:

I am unable to attend this hearing, so am providing you with my comments by written testimony. I ask you to find a strong Do Pass to SB 175.

This referendum bill is in the best interests of the citizens of Montana. It gives them a voice on how judges should be selected based on their legal and judicial qualifications rather than based on their ability to raise money and campaign effectively.

I was initially appointed to the bench in 1989 after going through the judicial nomination process and interview and appointment by the Governor. Two years later, I had a contested race against two other attorneys to retain my seat. Having experienced both of these methods of selection and having been on the bench for over 20 years, I have some criticisms of the open election process for new and incumbent judges.

(1) The judicial nominating process gave the commission members and the Governor an opportunity to question me on various pertinent topics relating to my judicial philosophy, my specific legal experience, my feelings about how to run a court, and how I interact with attorneys and litigants. I was presented with specific questions by both the committee and the Governor about such matters as scheduling orders, how I generally interpret statutes and court decisions, length of time to issue written decisions, and use of legal research tools. The members of the committee and the Governor were able to obtain sufficient information about me to determine whether I had the requisite skills, experience, and temperament to be a good judge.

Honorable Jeffrey M. Sherlock

Honorable Dorothy McCarter

Honorable Kathy Seeley

Honorable James P. Reynolds

January 24, 2011

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I also note that the judicial nominating commission can be made to be more independent, by having more of the members selected by entities other than the governor, with the governor retaining the role of selecting the final candidate.

(2) I was already a sitting judge during my contested race two years later. When questions about pending cases were presented to me, I was unable to comment on them or even defend myself when publicly criticized by the litigants and other members of the public. Ruling on high profile cases and issuing unpopular decisions, based on the law in effect at the time, was difficult when such rulings might have tended to polarize the voting public.

(3) Judicial candidates must raise money for their campaign. Most of the voting public is not very interested in judicial races and not enthusiastic about contributing to such campaigns. Consequently, most of the money comes from the candidate himself and from the attorneys in his judicial district — the very attorneys who appear in the judge's court.

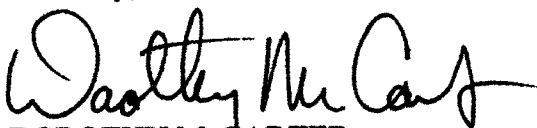
(4) Running a contested judicial race, although non-partisan and theoretically non-political, limits the opportunity of the candidate to educate and inform the voting public about the information so effectively obtained by the individuals in the judicial nominating and appointment process. Contested elections tend to be based on the quantity, not quality, of public exposure. This process is not conducive to obtaining judges based on their merit.

An additional, but significant, aspect of this referendum would provide an avenue to evaluate the performance of incumbent judges based on job-related criteria. However it is ultimately done, it would provide a performance assessment to the judges which they could use to improve themselves. It could also provide the voters with valuable information regarding the incumbent's performance for use in casting a vote to retain or not retain the judge — information they've never had before.

As you may know, attorneys are reluctant to criticize sitting judges, afraid that the judge would retaliate in a ruling against that lawyer and his/her client. After serving on the bench for so many years, I have had very little input on what the lawyers think of my performance, my temperament, or my way of handling cases. I would certainly welcome any evaluation of my performance as a critical way to improve myself as a judge.

Thank you for your consideration of my comments. I urge you to pass this bill to provide an opportunity for the voters to decide this important policy issue for themselves..

Sincerely,



DOROTHY McCARTER
District Court Judge

January 25, 2011

Dear Chairman and members of the Senate Judiciary Committee:

I am District Court Judge Katherine Curtis from Kalispell and I am providing this testimony in strong support of SB 175.

I have experienced throughout my legal career, and particularly during my 16 years as a District Court Judge, the difficulty concerned citizens experience in assessing and selecting the most qualified judicial candidates under the current method of selection. While I appreciate the confidence others have in my ability to assist them in selecting among the candidates, I believe the people of the State of Montana want and deserve a broader, more comprehensive evaluation of the candidates' qualifications. At the very least, it is appropriate to give the people the opportunity to decide through this referendum if the method of selection in this legislation is preferable.

Furthermore, judicial elections have become much more politicized in recent years, particularly given the money involved. These factors seriously jeopardize judicial independence, which is critical to guarantee fair and equal justice for all Montanans. Of course, the public's perspective and belief about judicial independence are also very important – our current system of judicial elections does not enhance the public's perspective of judicial independence. One need only consider proposed legislation introduced in this very session, SB 123, to understand that contested elections, and the necessity for candidates to solicit substantial financial contributions for a successful race, cause considerable concerns about judicial independence and the perception of independence.

SB 175 draws a proper balance between public accountability by providing for retention elections and judicial independence through merit selection and the resulting removal of significant political influence over judges. I strongly encourage its passage.



Testimony of the American Judicature Society in Support of SB175

The American Judicature Society (AJS) is a national, nonpartisan organization of judges, lawyers, and other citizens dedicated to maintaining the independence and integrity of the courts. Consistent with this mission, AJS since its inception has promoted a commission-based appointment system for selecting judges, with regular retention elections that are informed by an objective and broad-based judicial performance evaluation program. AJS believes that a system of merit selection, retention elections, and performance evaluations benefits the judiciary in several essential ways:

Selecting highly qualified judges. The merit selection commission recommends individuals for appointment on the basis of their professional qualifications rather than their political credentials. It considers applicants based on criteria relevant to a judge's role, such as impartiality, integrity, judicial temperament, collegiality, communication skills, and industry. Similar mechanisms for identifying qualified judicial candidates do not exist in elective systems. At the same time, the merit selection commission screens out unqualified applicants. A recent AJS study indicates that merit-selected judges are less likely than elected judges to be subject to judicial discipline and less likely to be removed from office when they are disciplined.

Limiting politics in the selection process. For the past decade, judicial elections have seen unprecedented campaign fundraising and spending, increased special interest group involvement, and relaxed ethical standards for candidate speech. Merit selection minimizes political and special-interest influences in the selection process by eliminating the need for candidates to raise funds, advertise, and make campaign promises. And, judges chosen through merit selection do not find themselves hearing cases brought by attorneys and litigants who supported their election campaigns. A 2009 decision by the U.S. Supreme Court highlighted this potential problem. The Court was reviewing a state supreme court decision that overturned a \$50 million verdict against an energy company. The CEO of the energy company had spent \$3 million to help elect one of the justices who voted with the 3-2 majority, but the justice did not recuse himself from participating in the case. In *Caperton v. Massey*, the U.S. Supreme Court ruled that, because of the "serious, objective risk of actual bias," due process required the justice's recusal from the case.

Bringing greater diversity to the bench. In addition to placing the best qualified judges on the bench, merit selection has the potential to increase diversity on the bench. This is because the merit selection process may be structured so that opportunities for seating judges who represent the racial, gender, and geographic diversity of the state or district are enhanced. In 2008, 45% of the minority judges serving on state appellate courts were chosen through merit selection, while only 24% of minority judges on these courts were chosen in contestable elections. One third of women judges reached the appellate bench through merit selection, and one third attained their seats through contestable elections.


Enhancing judicial performance while preserving judicial independence. The judicial performance evaluation evaluates judges' performance on the bench based on input from attorneys, jurors, litigants, court staff, and other judges who have come into contact with them. The evaluation is based on objective criteria such as knowledge of the law, fairness, professionalism, temperament, and communication skills, rather than on agreement or disagreement with judges' decisions. According to an AJS study of JPE programs in four states with retention elections, a majority of judges reported that the evaluation makes them appropriately accountable for their job performance, and nearly three fourths said the evaluation provides them with useful feedback for improving their performance.

Promoting public confidence in the judiciary. Merit selection systems enhance public trust and confidence in the courts. Recent national polls show that citizens are concerned about the role of parties, special interests, and money in judicial elections. According to a 2007 poll by the Annenberg Public Policy Center, between two thirds and three fourths of Americans believe that the need to raise money to conduct their campaigns influences judges' decisions. A 2004 Zogby poll revealed that nine in ten Americans fear that special interests are trying to use the courts to shape economic and social policy.



Judicial merit selection has stood the test of time. It was first adopted in 1940 in Missouri. During the 1960s and 1970s, twenty-three other jurisdictions adopted merit selection. Today, thirty-three states and the District of Columbia use merit selection to choose at least some of their judges. It is noteworthy that no state that has adopted merit selection since 1940 has returned to judicial elections. Governors, legislators, and voters in these states appreciate the benefits of merit selection, retention, and evaluation in identifying the best qualified judges and ensuring that those judges are politically independent and publicly accountable.

Respectfully submitted by:

Malia Reddick, Ph.D.
Director of Research and Programs
American Judicature Society
515/271-2287
mreddick@ajs.org


ARIZONA COMMISSION ON JUDICIAL PERFORMANCE REVIEW

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NEWS AND MEETINGS

10.08.10: JPR IN THE NEWS!
Watch the ABC15 Segment on JPR.
[\[READ MORE \]](#)

10.04.10: NEW! Short video explains how Arizona judges are chosen and how you can be an informed voter.
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09.16.10: Judicial Performance Review Commission Announces Official Performance Ratings for Judges
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06.18.10: Meeting Notice - June 23, 2010
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JUDICIAL PERFORMANCE REPORTS

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Maricopa Voters Only



Assignment During Survey Period: Civil
Appointed to Maricopa County Superior Court: 1999
[View Bio](#)

56% of the Commission Voted Judge ~~Meets~~ MEETS Judicial Performance Standards

15 Commissioners Voted "Meets"
12 Commissioners Voted "Does Not Meet"

Judicial Performance Standards Evaluation Categories	Attorney Responses Surveys Distributed: 453 Returned: 126 Detailed Report	Litigant/Witness/ProPer Responses Surveys Distributed: 69 Returned: 11 Detailed Report	Juror Responses Surveys Distributed: 37 Returned: 13 Detailed Report
	Score (See Footnote)	Score (See Footnote)	Score (See Footnote)
Legal Ability	81%	N/A	N/A
Integrity	95%	91%	100%
Communication Skills	82%	94%	100%
Judicial Temperament	89%	87%	100%
Administrative Performance	90%	94%	100%
Settlement Activities	84%	N/A	N/A

FOOTNOTE: The score is the percentage of all evaluators who rated the judge "satisfactory", "very good", or "superior" in each of the Commission's evaluation categories. Depending on the assignment, a judge may not have responses in certain categories, indicated by N/A (for example, some judicial assignments do not require jury trials).
The JPR Commission votes "Yes" or "No" on whether a judge "MEETS" Judicial Performance Standards, based on the statistical information as well as any other information submitted by the public or the judge. Further information on the judges and justices can be found at each court's website.

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SECTION 3: Appendices

How to read each judge's report

The reports in your voter guide summarize the information available to the Commission and state the results of the Commission's vote on each judge.

The two boxes in the top left of each report identify the court in which the judge sits, and the Commission's vote on whether the judge is qualified.

The large box in the top right provides biographical information about the judge. It also identifies the judge's major strengths and weaknesses, as determined from survey responses and public comments.

The bottom series of boxes provides the survey data for each judge. The data is broken down by attorneys, jurors, and all other survey participants. For attorneys and other participants, the box provides the judge's average score in each of the five categories. The box also provides an "approval percent," which indicates the percentage of survey questions in each category in which the judge received a score of 3 or higher. For juror surveys, the "approval percent" reflects the percentage of survey questions in each category for which the judge received a positive response.

The full report on each judge is available to the public at the State Commission's website, www.statejudicialperformance.com, or by contacting the Commission directly.

Judge Armistead O. Hull

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
(Washington, Adams and
Jefferson Counties)

By a Vote of 10-2, the
Commission Concludes that
Judge Hull is
QUALIFIED
to Serve on the
District Court

Judge Armistead O. Hull was appointed to the Fourth District Court in November 1999. He received his law degree from the University of Chicago in 1978. Before he was appointed to the bench, Judge Hull served as an Assistant District Attorney, and also practiced law privately. Judge Hull is married and has three children. He is active in several civic organizations.

STRENGTHS OF JUDGE HULL'S PERFORMANCE

- **Legal knowledge.** Judge Hull received high marks for his strong command of the law, as well as his understanding of the rules of evidence and procedure.
- **Efficiency.** Judge Hull was praised for managing cases efficiently and with minimal delay. He issues written orders promptly.
- **Clarity.** Jurors and attorneys rated Judge Hull highly on the clarity of his orders and instructions.

WEAKNESSES OF JUDGE HULL'S PERFORMANCE

- **Temperament on the bench.** Several survey respondents commented that Judge Hull too frequently treats attorneys with condescension and has a short temper.

<u>Judicial Performance Evaluation Categories</u>	<u>Attorney Responses</u> Surveys Distributed: 204 Surveys Returned: 88		<u>Juror Responses</u> Distributed: 86 Returned: 76	<u>Litigant Responses</u> Distributed: 31 Returned: 13	<u>Other Responses</u> Surveys Distributed: 103 Surveys Returned: 26	
	<u>Avg. Score</u>	<u>Approval%</u>	<u>Approval%</u>	<u>Approval%</u>	<u>Avg. Score</u>	<u>Approval%</u>
Legal Ability	4.8	98%	—	—	4.7	91%
Integrity	4.6	95%	95%	77%	4.4	85%
Communication Skills	4.1	88%	94%	92%	4.5	93%
Judicial Temperment	3.1	71%	87%	77%	3.8	82%
Administrative Perf.	4.3	92%	—	—	4.2	88%